



---

**Comptroller General  
of the United States**

Washington, D.C. 20548

---

# Decision

**Matter of:** Gentex Corporation

**File:** B-271381

**Date:** June 18, 1996

---

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.  
Jeffery Greer, Esq., and Charles J. Roedersheimer, Esq., Defense Logistics Agency,  
for the agency.  
Scott A. Ford, Esq., and Gerard F. Doyle, Esq., Doyle & Bachman, for Scott  
Aviation, an intervenor.  
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

---

## DIGEST

1. Protest challenging award on ground that offered item does not comply with qualified products list requirement is denied where the solicitation did not require compliance with this requirement.
2. Protest challenging agency's post-award modification that incorporated qualified products list, engineering data list, and military cleaning and marking instruction into the contract is denied since there is no showing that protester was prejudiced by the agency's action.

---

## DECISION

Gentex Corporation protests the award of a contract to Scott Aviation under request for proposals (RFP) No. SPO920-95-R-X035, issued by the Defense Logistics Agency (DLA), Defense Electronic Supply Center (DESC), for two sizes of pilot pressure-demand breathing oxygen masks and related facepiece assemblies, a bracket assembly, and guide cable components. Gentex challenges the award to Scott on the ground that a mandatory component of Scott's offered oxygen mask does not appear on the applicable qualified products list (QPL). Gentex further protests a post-award modification that in essence requires Scott to comply with the QPL requirement along with certain engineering data list (EDL) and military cleaning and marking instruction (CMI) requirements.

We deny the protest.

The solicitation was issued on September 8, 1995, and required offerors to propose unit prices and delivery schedules for eight contract line item numbers (CLIN) for a base year with 2 option years. Offerors were invited to complete two pricing schedules for each CLIN: an "ALL-OR-NONE PRICING" schedule and/or a "STAND-ALONE PRICING" schedule. In this regard, the RFP provided that the government could make one award or "a combination of awards," depending on which price or combination of prices--considered in context with the corresponding delivery schedules--would result in the "lowest estimated overall cost" to the agency.

Each CLIN corresponded to one of the specified oxygen masks or related equipment assemblies. Of significance to this protest, the item descriptions for the oxygen masks--CLIN Nos. 0001 and 0005--listed the masks by their national stock number (NSN), as well as by Scott's and Gentex's commercial and government entity number and individual manufacturer part numbers. Except for the NSN and manufacturer identification information, no technical description or technical specifications were set forth, or incorporated by reference, in the RFP. Offerors were not required to submit any type of sample for inspection or testing.

By the September 28 closing date, only Scott and Gentex had submitted proposals. By letter dated November 14, after concluding discussions with each offeror, DESC requested best and final offers (BAFO). Both Scott and Gentex responded that their initial proposals remained unchanged. On November 30, DESC awarded a contract for CLIN Nos. 0001 through 0005 and CLIN No. 0007 (the two oxygen masks and related facepiece assemblies) to Scott. Gentex received a contract award for CLIN Nos. 0006 and 0008 (the bracket assembly and guide cable components).

On January 15, 1996, DESC notified Gentex of the Scott award. On January 26, Gentex attended an agency debriefing and asked DESC whether Scott's offered mask contained a mandatory QPL component--a combination inhalation/exhalation valve which controls the mask's oxygen flow. Gentex also asked DESC whether Scott's offered mask complied with an Air Force EDL, which--in addition to recommending QPL component compliance--sets forth other preferred technical specifications for the mask being procured here. Finally, Gentex asked DESC whether Scott's offered mask adhered to CMI No. 794-0858, which sets forth recommendations for cleaning, handling and storing life support oxygen breathing devices and component parts.

In response to Gentex's questions, the contracting officer advised the protester that if Scott's proposed mask did not contain the QPL inhalation/exhalation valve component or did not otherwise comply with the EDL or CMI requirements, the agency would probably terminate the contract. Thereafter, by facsimile dated February 16, the contracting officer's supervisor contacted Scott and requested a "no-cost cancellation" of the awarded contract.

Apparently, at the time of the debriefing and during preparation of its first termination request, the contracting officer and her supervisor believed that the QPL, EDL, and CMI requirements were terms of the solicitation. However, shortly after discussing the matter with Scott, the agency discovered that contrary to its initial impression, the RFP did not contain or otherwise incorporate any QPL, EDL or CMI requirements.

On February 27, Gentex contacted the contracting officer to determine whether Scott's contract had been terminated. During this telephone conversation, the contracting officer advised Gentex that termination appeared unlikely. On March 7, Gentex filed this protest at our Office. Shortly thereafter, by agreement dated March 19, and by means of a formal contract modification executed on April 12, Scott agreed to perform the contract in accordance with the QPL, EDL and CMI criteria at no additional cost to the government. In this regard, Scott will demonstrate its QPL and EDL compliance by means of first article testing.

#### PROTESTER'S POSITION

Although there is no question that the RFP does not expressly set forth the QPL, EDL or CMI criteria, Gentex nonetheless argues that the RFP effectively incorporated the QPL criterion as a result of its reference to a master solicitation which sets forth various QPL provisions. Gentex also argues that since the agency identified each mask by its designated NSN, the underlying NSN data and referenced military specifications--requiring QPL compliance--is automatically incorporated as a mandatory term of the RFP. Finally, Gentex objects to the agency's post-award execution of a modification incorporating the omitted EDL and CMI requirements.

#### DISCUSSION

##### Interpretation of the RFP

First, there is no basis for Gentex's argument that this RFP incorporated the master solicitation's QPL provisions. Under the DESC master solicitation method, suppliers are given a lengthy master solicitation that contains standard contract provisions, to use in conjunction with subsequent individual solicitations and contracts, which are streamlined documents that specifically incorporate by reference pertinent standard terms, paragraphs and conditions set forth in the master solicitation. See generally Federal Acquisition Regulation (FAR) §§ 14.203-3 and 15.408(d); Sonetronics, Inc., B-237267, Feb. 12, 1990, 90-1 CPD ¶ 178.

In this case, although the RFP referred to the master solicitation, it did so by advising offerors that only those paragraphs from the master solicitation which

were referenced in the RFP were applicable. Specifically, the cover page of the RFP provided:

"This Individual Solicitation (IS) must be read in conjunction with the DESC Master Solicitation (MS). This IS incorporates the full text of the paragraphs referenced herein of the DESC MS dated February 1992, and Amendment One, dated April 1992." (Emphasis added.)

In light of the highlighted language, we think it clear that absent an express reference to or restatement in the RFP of a master solicitation provision, no term or clause of the master solicitation applied to this procurement.

Second, the agency's use of the NSN identifications in the RFP could not have had the effect of incorporating the QPL requirement as a mandatory term in this solicitation. The QPL is a qualification requirement. Although qualification requirements are considered to be for the benefit of the government, see Goodyear Tire & Rubber Co., 72 Comp. Gen. 28 (1992), 92-2 CPD ¶ 315, recon. denied, Varec N.V.-Recon., B-247363.7, Mar. 23, 1993, 93-1 CPD ¶ 259, because qualification requirements are inherently restrictive, an agency may only use such provisions where it complies with certain notice requirements imposed by the FAR. Under the FAR, an agency which chooses to impose a qualification requirement must prepare a written justification for the requirement, FAR § 9.202(a)(1); provide offerors all requirements they must satisfy to become qualified, FAR § 9.202(a)(2); and provide an opportunity for qualification before award by publishing a notice in the Commerce Business Daily. FAR § 9.205. Finally, when an acquisition includes a component that is subject to a qualification requirement, FAR §§ 9.206-1(d) and 9.206-2 require contracting officers to insert the "Qualification Requirements" provision at FAR § 52.209-1 in the solicitation.

If these notice requirements are not complied with, and particularly if FAR § 52.209-1 is not expressly incorporated in the solicitation, an agency may not enforce any qualification provisions. See FAR § 9.206-1(a); Warren Pumps, Inc., B-258710, Feb. 13, 1995, 95-1 CPD ¶ 79, aff'd, B-258710.2, July 14, 1995, 95-2 CPD ¶ 20; Comspace Corp., B-237794, Feb. 23, 1990, 90-1 CPD ¶ 217.

In this case, the RFP did not contain any reference to FAR § 52.209-1. Under these circumstances, we see no basis for Gentex's interpretation that the RFP required the awardee to provide an oxygen mask which complied with the QPL criterion argued for by the protester.<sup>1</sup>

---

<sup>1</sup>In its protest, Gentex also contends that the QPL requirement was a definitive responsibility criterion which the agency improperly waived. Since we conclude  
(continued...)

In any event, even if it could be argued that the RFP somehow incorporated the QPL requirement, Scott's offer on its face took no exception to any requirements that were imposed by the solicitation. Therefore, the agency had no basis for rejecting it on this ground. See E. W. Bliss Co., B-255648.3, Apr. 26, 1994, 94-1 CPD ¶ 280 (agency properly determined that awardee's offer included new crankshaft component since proposal did not state otherwise).

#### Post-Award Contract Modification

Gentex contends that instead of executing a post-award modification, the agency should have canceled the RFP as defective and resolicited the requirement with the recommended QPL, EDL and CMI provisions. Gentex contends that it was prejudiced by the post-award modification since "by virtue of the agency's action [Gentex] lost a three year procurement with an estimated contract value of approximately 2.3 million dollars."

To the extent this protest ground is reviewable by our Office and is not a matter of contract administration, see 4 C.F.R. § 21.5(a) (1996), we point out that competitive prejudice is an essential element of every viable protest, and where no reasonable possibility of prejudice is shown or is otherwise evident from the record, our Office will not sustain a protest, even if a deficiency in a procurement is apparent. See EEV, Inc., B-261297; B-261297.2, Sept. 11, 1995, 95-2 CPD ¶ 107.

At the time it competed for this award, the protester believed that the RFP contained the QPL, EDL, and CMI requirements. Thus, Gentex actually competed under the impression that the more restrictive terms applied--the same terms which, in the event we sustained Gentex's protest against the post-award modification, would be incorporated in the ensuing solicitation. This being the case, we see no basis to conclude from this record--nor does Gentex argue--that its pricing or delivery schedule would change in the event of a resolicitation. Moreover, the protester does not suggest that Scott's lower prices for the line items in question resulted from its intention to furnish a non-QPL valve or to otherwise avoid the

---

<sup>1</sup>(...continued)

that the QPL requirement was not a part of the solicitation, we will not consider this argument further; in any event, solicitation qualification requirements do not involve matters of responsibility. See Goodyear Tire & Rubber Co., supra.

EDL and CMI requirements. Accordingly, on this record we can only conclude that Gentex was not prejudiced by the agency's post-award modification.

The protest is denied.

Comptroller General  
of the United States